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QUESTION PRESENTED

Whether a large unselective membership organization can invoke the First Amendment to defeat application of an anti-discrimination law and expel a long-standing exemplary member, when none of the expressive purposes that bring its members together are significantly altered or burdened by application of that law.

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STATEMENT OF THE CASE

This case concerns the Boy Scouts of America's decision to expel James Dale from membership because he is gay.

The Boy Scouts Of America

Petitioner Boy Scouts of America ("BSA") is a national recreational organization with a unique position in American society. Scouting is part of growing up for many boys, a central presence in their schools and communities, and an enriching life experience for adult participants as well. "Fifty percent of all boys today between the ages of seven and ten are Cub Scouts, and 20 percent between 11 and 18 are Boy Scouts." JA 523.[1] BSA maintains and manages the nationwide Scouting organization, which when this case began had a membership of more than four million youth and one million adults. R.1020. BSA has sought this inclusiveness, declaring, "Neither [our federal] charter nor the bylaws of the Boy Scouts of America permits the exclusion of any boy." JA 66. With over 90 million members since its inception in 1910, R.1323, BSA's promotional materials boast that Scouting is "the largest youth movement the free world has ever seen." R.1157.

BSA's corporate structure is highly centralized at the national level, but then divides into regions, districts, councils, and local units. JA 348-58. Those units are formed through the granting of charters to local organizations upon application—in essence, "franchising."[2] JA 375. Each char-

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[1] Consistent with the Petitioners' references to the record, numbers followed by "a" refer to pages in the bound Appendix submitted with the Petition for Writ of Certiorari. Numbers preceded by "JA" refer to pages in the bound Joint Appendix. Numbers preceded by "R" refer to pages in the joint appendix below. Numbers preceded by "L" refer to pages in the bound Joint Lodging Materials.

[2] "Informally, the term 'franchise' helps to explain what is meant by 'chartering' an organization. 'Franchise' implies local ownership while still using the corporation name and resources." BSA Membership/

tered organization "owns" the troop, and "receives a national charter yearly to use the Scouting program as a part of its youth work." R.967.

Through its franchising of local units, BSA forms an extraordinary partnership with government, as well as diverse community groups and religious entities. In New Jersey alone, as of 1993, troops were sponsored and owned by over 600 government agencies or organizations operating under state aegis, including 15 city governments, 92 law enforcement agencies, 191 public schools, 281 school parent-teacher associations and groups, 21 boards of education, 6 Army National Guard units, 4 Navy units, 1 Coast Guard unit, 2 Disabled Veterans units, 3 Air Force units, 10 Army units, and 132 fire departments. R.1278-80.

In New Jersey, public schools and school-affiliated groups constitute approximately one-fifth of the chartering organizations in the state. 4a. Nationwide, "[m]ore than 26 percent of Scouting's chartered organizations are PTA and other academic and education organizations." JA 69. In addition, public schools regularly allow BSA special access to recruit in classrooms and on school grounds. JA 86; JA 102-05; JA 124; JA 442. BSA declares that "[t]he education field holds our greatest potential[.]" JA 70. For example, a guidebook recently issued by one BSA council urges "school coordinators" to give a "[p]ersonal invitation to every boy in school to join scouting," and exhorts the "classroom presentation coordinator" to "band every boy, tag every boy, stick every boy" to reach the goal: "Every classroom, every boy." National Capital Area Council, *1997 School Night to Join Scouting: Join Scouting Night Guidebook*, Lodging of Documents by *Amici Curiae* Roland Pool and Michael Geller, at 609.

Relationship Committee Guide *quoted in* Taylor, Larry A., "How Your Tax Dollars Support the Boy Scouts of America," The Humanist, at 6-13 (Sept.–Oct. 1995) <<*http://www.humanist.net/religion/bsa.html*>> (viewed on February 13, 2000).

BSA also receives a wide range of special privileges and benefits from federal and state government, such as a federal charter, favorable tax treatment, access to facilities and services, and a close association with Congress, the President, the military, the astronaut corps, and other departments and agencies. 4a; 27a-30a; *see infra* at 14-15.

All one-million-plus BSA adult members are automatically "leaders." 11a. In practice, BSA is as non-selective in welcoming adult members as youth members. James Kay, "the highest ranking employee in Monmouth Council and the official who first made the decision to terminate Dale," 78a, acknowledged that he was not aware of any rejection of an adult application for membership. JA 751.

Scouting's rules and message are explicitly pluralistic. BSA bylaws declare Scouting to be "absolutely non-sectarian," JA 362, a requirement repeated on every adult membership application. No troop may require its members to hold any particular religious belief or participate in any particular religious ceremony. R.1176. "BSA categorically states: '[r]eligious instruction is the responsibility of the home and church.' " 9a; *see also* R.4412.

Sexual behavior of any kind is deemed inappropriate within the context of the Scouting experience, JA 655, as is any substantive discussion of sexuality. Guidelines for Scoutmasters declare that boys should "learn about sex and family life from their parents, consistent with their spiritual beliefs." JA 668; JA 758.

Likewise, BSA executives advise that homosexuality is "not a Scouting issue," JA 673, and that BSA has no requirement that any interpretation of "morally straight" bearing on homosexuality be shared by participants, or taught or communicated by Scouting sponsors, leaders, or members. JA 460-61; JA 666; JA 696-97; JA 757-58. Although charter applications "obligate the [sponsors to] . . . provide youth

members with the opportunity for a quality program experience *as set forth in the official literature,*" JA 375 (emphasis added), a position on homosexuality is not found in BSA's literature,[3] none is disseminated to BSA members, parents, or sponsors, and no restriction is mentioned at any point in BSA's broad solicitation of a representative membership. BSA has never communicated any instruction to its members, including Scoutmasters or sponsors, that they must believe or convey to youth that "morally straight" includes an implicit view that gay people or homosexuality are immoral and incompatible with Scouting. JA 753-55.[4]

Notwithstanding this unbroken organizational silence on sexual orientation, BSA national officials initiated a practice of excluding "known or avowed" gay youth and adult members. Cert. Pet. at 3.[5] BSA has never announced this policy

[3] No view whatsoever regarding sexual orientation is articulated in the tens of thousands of pages of Scouting literature, JA 691-92, including the application for adult membership, L.9; the application for youth membership, L.3-8; *The Boy Scout Handbook*, R.399-752; *The Scoutmaster Handbook*, R.753-901; *Advancement Guidelines*, R.582-1587; the many histories of Scouting, R.4341-42; the voluminous training materials or extensive training courses offered by Scouting, R.3970; R.4018; R.4342; R.4416; or in Scouting "Fact Sheets"—documents intended to "tell . . . the story of scouting, talk about the programs, standards and values of the organization, to bring it to young people and others." JA 4434-60.

[4] Only a handful of internal documents, dated from 1978 to the early 1990s, refer to the exclusion of gay youth and adult members and staff. JA 453; JA 460-61; JA 669. None have been circulated among youth or adult members, JA 753-54, or even made available upon request. JA 662; JA 669.

[5] BSA's undistributed "position statements" (there is no written policy as such) state a blanket rule that "Boy Scouts of America does not accept homosexuals." JA 457-59; *see also* JA 137 (letter stating "grounds for [Dale's] membership revocation" that BSA "specifically forbid[s] membership to homosexuals"). Because BSA "does not ask prospective members about their sexual preference," JA 460, however, the excluded group only consists of those known to be gay, either through their own

outside of litigation, or communicated it to members or sponsors. *See supra* notes 3-4. However, if troops inquire, they are told they have no choice but to follow the discriminatory policy. *See* JA 701.

BSA allows its members and sponsors to voice their disagreement with the membership policy, so long as they are not known to be gay themselves.[6] Likewise, members and sponsors can have widely divergent views on what it means to be "morally straight"—and whether that tenet relates to sexual orientation in any way—again, so long as they are not known to be gay themselves.[7]

statements or otherwise. JA 746 ("known or avowed homosexual persons" will not be registered). Contrary to BSA's claim in its brief that "Scouting makes no effort to discover the sexual orientation of any person," Pet.'s Br. at 6, the record reflects that if "an individual involved in Scouting is alleged to be a homosexual . . . [t]he matter should be investigated in a discreet and responsible fashion." JA 455.

[6] *See, e.g.*, JA 623 (Aff. of a Scoutmaster, whose troop voted in favor of a resolution opposing the exclusionary policy, but whose charter was subsequently renewed); JA 655 (Aff. of adult leader of BSA, author of BSA materials and trainer of other Scout leaders, who has "been involved in an ongoing dialogue with professional and volunteer Scouters about [his] opposition to [the] exclusionary policy," and been told that "voicing [his] opposition . . . is not grounds for revocation of [his] Scouting membership"); JA 665 (Aff. of Assistant Scoutmaster: "Despite my open opposition to the Scouting policy of excluding homosexuals from membership, I have been asked to continue in my role as an adult leader in Scouting."); JA 637 (Letter from Monterey Bay Area Council stating that its applications for youth and adult membership "do not discriminate on the basis of . . . sexual orientation").

[7] *See, e.g.*, JA 557; JA 560 (Aff. of Lutheran pastor, ¶¶4, 9); JA 563; JA 565 (Aff. of Executive Presbyter of the Presbytery of Elizabeth, ¶¶3, 9); JA 571 (Aff. of Roman Catholic bishop, ¶11); JA 597 (Aff. of President of the Union of American Hebrew Congregations, ¶4); JA 608-09 (Aff. of Bishop of the Episcopal Diocese of Newark, ¶¶3-5); JA 615 (Aff. of Roman Catholic priest, ¶4); JA 618-19 (Cert. of Methodist bishop, ¶¶3-4); R.3805-06; R.3815-21; R.3863-69 (Statements of the Unitarian Universalist Association, the United Church of Christ, and the Religious Society of Friends).

James Dale

At the time of his expulsion shortly after his twentieth birthday, James Dale had spent more than half of his life in Scouting. His record was "exemplary." 157a. In addition to teaching him outdoor and other practical skills, Scouting provided Dale with a sense of civic and ethical responsibility, fostered his self-confidence, and gave him the opportunity to have fun and form friendships with other boys in his community. JA 113-14. BSA recognized Dale's outstanding commitment and abilities, JA 116-19, admitting him to the Order of the Arrow (established by BSA to "recognize those Scout campers who best exemplify the Scout Oath and Law in their daily lives," JA 43), and awarding him its highest rank, Eagle Scout (attained by only two percent of all Scouts, JA 705). Dale held various youth leadership positions in Scouting, including Junior Assistant Scoutmaster from 1985 through 1988. JA 116. In August 1988, when he turned 18, Dale became an adult member and was asked to become an Assistant Scoutmaster in his troop. JA 119; L.9. Throughout his entire time in Scouting, he exemplified, "accept[ed] and endors[ed] Boy Scouts' moral principles." 57a.

While an undergraduate at Rutgers University, Dale first acknowledged, both to himself and to his friends and family, that he is gay. JA 126. In July 1990, the 19-year-old attended a seminar at Rutgers on the psychological and health needs of lesbian and gay teenagers, including the harms caused by discrimination and isolation. A local newspaper, the *Newark Star-Ledger,* ran an article entitled "Seminar addresses needs of homosexual teens," included Dale's picture, and identified him as co-president of the campus lesbian and gay student group. JA 127; L.10. The article did not mention BSA or identify Dale as a BSA member.

Days later, Monmouth Council sent Dale a letter "revok[ing]" his membership and instructing him to "sever

any relations [he] may have with the Boy Scouts of America." JA 135. Stunned, Dale wrote back asking the reason. JA 136. BSA responded by mail that it "specifically forbid[s] membership to homosexuals." JA 137. No BSA representatives spoke with Dale during the course of his expulsion, asked his views on sexuality or any topic, or questioned his approach to Scoutmaster duties. Indeed, a subsequent letter from BSA Legal Counsel David K. Park to Dale's counsel flatly stated:

> As your client is apparently an avowed homosexual and the Boy Scouts of America does not admit avowed homosexuals to membership in the organization, no useful purpose would apparently be served by having Mr. Dale present at the regional review meeting.

JA 138.

On July 29, 1992, Dale brought this suit against BSA and its Monmouth Council, charging that revocation of his membership based on his sexual orientation violated the New Jersey Law Against Discrimination ("LAD"). JA 10-28. He sought reinstatement to continue participating in the organization, affirming his continuing belief in Scouting and the Scout Oath and Law. *See* JA 27; JA 492; JA 510-12.

The Superior Court Of New Jersey, Chancery Division

On cross-motions, the Superior Court of New Jersey, Chancery Division, granted summary judgment for BSA and dismissed Dale's complaint on statutory grounds, holding that BSA is not a "place of public accommodation" under the LAD because (i) it is not a physical "place," but "an entity," 205a; and (ii) its membership "is limited to those who subscribe to the Scout Oath and Law" and is therefore selective. 208a. In dicta, the court endorsed BSA's alleged expressive association defense, citing the King James Bible,

"Judeo-Christian tradition," and a history of "sodomy" statutes to construe BSA's moral views. 193a-194a.

The Superior Court Of New Jersey, Appellate Division

On March 2, 1998, the Superior Court of New Jersey, Appellate Division, reversed. The court found that BSA was a place of public accommodation, and held the lower court's "narrow interpretation" of the LAD inconsistent with New Jersey precedent. 115a. It cited factors such as BSA's open invitation to membership, large size, and substantial government entanglement, and rejected BSA's attempt to fit into the LAD's exemptions. 119a-125a. The court found no infringement of intimate or expressive association rights, noting in particular that it is an "undisputed fact that the BSA's collective 'expressive purpose' is not to condemn homosexuality." 135a. The court also concluded that, unlike the application of Massachusetts public accommodation law to a parade in *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), freedom of speech is not implicated or infringed in this case. 148a.

The Supreme Court Of New Jersey

The Supreme Court of New Jersey unanimously affirmed. The court found that BSA is a public accommodation, and that it does not fit within the LAD's exemptions for "distinctly private" groups or religious schools. The court based these conclusions on a detailed examination of the record, emphasizing BSA's "substantial public solicitation," 24a-27a; its lack of selectivity, 32a-39a; its "close relationships" with government, particularly its "connection to public schools and school-affiliated groups," 27a-30a; and its nonsectarian, pluralistic nature. 39a-40a. BSA also failed to qualify for the LAD's *in loco parentis* exemption. 40a-41a.

The court rejected BSA's claim of intimate association protection at the troop and full organizational level, finding

that the typical troop size of between 15 and 30 members, the character of the relationship between Scoutmasters and youth members, and BSA's open membership policy demonstrate that BSA troops are not intimate associations. 45a-50a. It considered BSA's alleged expressive association defense and found that:

> The organization's ability to disseminate its message is not significantly affected by Dale's inclusion because: Boy Scout members do not associate for the purpose of disseminating the belief that homosexuality is immoral; Boy Scouts discourages its leaders from disseminating any views on sexual issues; and Boy Scouts includes sponsors and members who subscribe to different views in respect of homosexuality.

52a. It noted that both the record and amicus briefs indicated that even BSA's religious sponsors differed significantly in their views on homosexuality. 55a-56a.

The court rejected BSA's speech claim as well. Comparing this case to the facts of *Hurley*, the court found that "Dale's status as a scout leader is not equivalent to a group marching in a parade," 65a, that "Boy Scout leadership [is not] a form of 'pure speech' akin to a parade," and that BSA remains free to "shape its expression." 66a.

Finally, the court held that "[i]t is unquestionably a compelling interest of this State to eliminate the destructive consequences of discrimination from our society," 62a, and thus "even if the application of the LAD . . . had resulted in some slight infringement," that infringement "is justified." 63a-64a.

SUMMARY OF ARGUMENT

BSA, "an American institution," 64a, and a singularly inclusive civic organization uniquely entwined with the government, expelled a gay 20-year-old long-time member because of his identity. BSA's status-based discrimination

targets all levels of Scouting, youth as well as adult, to exclude gay boys and men because of their sexual orientation. To defeat the mandate of New Jersey's Law Against Discrimination, BSA asks this Court to hold that the First Amendment leaves states powerless to prevent such discrimination by public accommodations. Instead, the Court should hold that the LAD's prohibition on discriminatory conduct, a rule that neither aims at nor effects the suppression of First Amendment freedoms, prevails here to require Dale's reinstatement. That result will not interfere with BSA's ability to craft and control its own message, but will serve New Jersey's vital interest in guaranteeing equality of opportunity in important institutions that open their doors to the public.

BSA's government entanglement and the large, open nature of the organization defeat BSA's efforts to cloak itself in the mantle of highly private associations. The especially public nature of this group diminishes its claim that it must be wholly walled off from government in the name of the First Amendment, and conversely increases the government's interests in curbing its identity-based discrimination.

The freedom of expressive association does not shield BSA's anti-gay membership practice from the LAD's mandate. Ending that practice will not affect in any significant way the members' ability to convey their expressive purposes. BSA's diverse members and sponsors do not come together for any anti-gay or gay-incompatible expressive goals. In fact, BSA welcomes in its ranks those who assert that gay people are "morally straight" and should be able to participate equally—so long as those asserting such views are not themselves known to be gay. But even assuming, *arguendo*, that BSA's expressive purposes were as claimed in its brief, it is undisputed that in its programs and materials BSA does not communicate to Scouting youth or the public any view condemning homosexuality or gay people, or require its sponsors or Scoutmasters to do so. Dale and

other openly gay members can fully accomplish the important work of Scoutmasters, with no effect on BSA's message. Moreover, any burden allegedly imposed by halting sexual orientation discrimination is more than justified by New Jersey's compelling interests.

Nor does freedom of speech provide a valid defense here, as no BSA speech is compelled by ending its discriminatory membership practice. Inclusion of human beings under a civil rights law cannot be translated into speech; if it could, all discriminators could raise a First Amendment shield to any equal opportunity statute. BSA remains free to say whatever it pleases, and to require any member, sponsor, or leader, including Dale, to express only BSA's views within Scouting.

Finally, an organization as vast, non-selective, and entwined with government as BSA cannot claim the freedom of intimate association to shield itself from the LAD. This is especially true given that individual troops are forced to apply BSA's anti-gay membership exclusion.

ARGUMENT

I. BSA'S CHOSEN ENTWINEMENT WITH GOVERNMENT SHOWS THAT IT IS FAR FROM WHOLLY PRIVATE, AND HEIGHTENS NEW JERSEY'S INTERESTS IN FORBIDDING DISCRIMINATION HERE

"An association must choose its market." *Roberts v. United States Jaycees*, 468 U.S. 609, 636 (1984) (O'Connor, J., concurring). When an organization enters the commercial sphere, it decreases its claim to privacy and triggers government interests in regulating discriminatory practices. *See, e.g., Hishon v. King & Spalding*, 467 U.S. 69 (1984). However, government's interests in combating discrimination are

not limited to the commercial context.[8] *See Roberts*, 468 U.S. at 625-26. BSA has made the decision to seek and trade on its unique relationship with government at all levels, and to open up to all boys in the nation as its constituency. This choice, too, diminishes privacy and triggers especially strong government interests. BSA cannot fairly inflate its freedom of association claim simply by repeatedly invoking the word "private." *Cf.* Pet.'s Br. at 2, 18, 20, 22, 27, 29, 34, 38, 45, and 47. In fact, the exceptionally unselective nature of BSA and its association with government decrease its entitlement to wall itself off from government and "affect it with a public interest." *Munn v. Illinois*, 94 U.S. 113, 129 (1876); *see also Nebbia v. New York*, 291 U.S. 502, 534 (1934); *Prune-Yard Shopping Ctr. v. Robins*, 447 U.S. 74, 84-85, 87 (1980).

BSA is a massive organization whose unique nature and self-positioning are not fairly captured by "private." Its prominence in American life is a product of (1) its symbiotic involvement with government, including government entities' direct ownership and operation of troops and programs; (2) its aggressive and all-embracing outreach;[9] (3) its

[8] BSA and its amici rely heavily on Justice O'Connor's dictum about Scouting in her concurrence in *Roberts*, 468 U.S. at 636, but of course this Court in *Roberts* did not have before it any of the evidence regarding either BSA's unique government entwinement or its commercial enterprises. While its members undoubtedly engage in valuable recreational and expressive activities, BSA is in many respects also a commercial entity. In 1992, BSA councils operated more than 700 residential camps around the country. *See* R.1395. BSA councils provide camping and outdoor facilities, program material and literature, planning tools, and other program aids. R.1184. BSA advertises aggressively; referring to BSA's "broad public solicitation through various media," a BSA spokesman stated, "scouting [is] a product and we've got to get the product into the hands of as many consumers as we can." 25a-26a.

[9] Far more than the value-inculcating entity denied an associational defense in *Runyon*, BSA conducts "aggressive recruitment through national television, radio and magazine campaigns." 3a; *cf. Runyon v. McCrary*, 427 U.S. 160, 172-73 n.10 (1976) ("[T]he petitioning schools are private only in the sense that they are managed by private persons and

proclaimed pluralism; and (4) its resulting diverse, "representative" membership.[10] BSA cannot have it both ways—benefited and sponsored by government entities when it holds itself out to the public, then intensely private when it asks this Court to deny the government's ability to hold it to the public accommodations law's requirement of nondiscrimination.

Unlike virtually all private organizations in this country, BSA has a relationship with public entities whereby those entities, along with others, implement BSA's program at the local level. The *Troop Handbook* declares that chartered (or "franchised") sponsors, including public entities, actually own and operate the troops.[11] As the *Scoutmaster Handbook* puts it, "The chartering process becomes in practice a working partnership, in which the organization agrees to accept certain responsibilities and the BSA agrees to provide certain services." R.776. While "[t]he program is flexible, . . . major departures from BSA methods and policies are not permitted." L3. Thus the sponsors' representatives—firefighters, police officers, teachers, etc.—are implicated in

they are not direct recipients of public funds. Their actual and potential constituency, however, is more public than private. They appeal to the parents of all children in the area who can meet their academic and other admission requirements. This is clearly demonstrated in this case by the public advertisements.") (citations omitted); *see also id.* at 188 (Powell, J., concurring).

[10] BSA's official materials emphatically proclaim its desire to have a "representative membership," reflecting not just race or ethnicity, but "proportionately the characteristics of the boy population." JA 64-65. BSA tells the public that its "high hopes for the nation's future . . . cannot flower if any part of our citizenry feels deprived of the opportunity to help shape the future." JA 66-68.

[11] *See* R.967 ("Your troop is 'owned' by a chartered organization. It receives a national charter yearly to use the Scouting program as part of its youth work."); *see also* JA 57; R.776. James Kay, head of petitioner Monmouth Council, testified that it is these sponsoring groups, including schools and police, "that actually conduct the Scouting program." JA 308.

executing the practices mandated by BSA's national bureaucracy.[12]

From its inception, BSA has contemplated operating through the nation's public schools, establishing in-school scouting programs in its by-laws "which take place during school hours and/or as part of school curriculum" in order to "further [BSA's] purpose and relationship concept." JA 442. In New Jersey, public schools and school-affiliated groups sponsor nearly 500 scouting units. R.1278. BSA's 1991 Report to Congress stated, "[a]cross the nation as young people returned to school . . . BSA's Learning for Life program entered the classroom with them." R.4506 ("Learning for Life is a weekly youth program presented during the school day by the classroom teacher or a council presenter."). Nationwide, school representatives thus run school troops, implement BSA activities and policies, and reach out to the community in the name of the schools' chartered BSA units. *See* JA 69-70. Public schools also offer BSA privileged access for recruitment. *See supra* at 2.

Beyond schools, state governments have granted BSA a wide range of special privileges and benefits not accorded other "private" organizations. For example, in New Jersey, real and personal property used for the purposes of and in the work of the Boy Scouts is exempt from state taxation. N.J. Stat. Ann. § 54:4-3.24.[13] New Jersey does not charge

[12] *Cf. San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 526, 544 (1987) (O'Connor, J., dissenting) (finding state action based on degree to which private entity and the government act as "joint participants"). Dale does not claim state action here, but rather that BSA's choice to operate very much in the public sphere and to embrace government diminishes its claim to a First Amendment shield and augments New Jersey's interests.

[13] Tax advantages like those granted by New Jersey are common features of state tax codes across the country. *See, e.g.*, Ala. Code § 40-9-12; Wis. Stat. Ann. § 70.11. Several states have implemented specialty

registration fees for motor vehicles owned by local BSA councils, *id.* § 39:3-27; grants reimbursement for certain BSA training expenses, *id.* § 54:39-66; and stocks with fish any body of water "that is under the control of and for the use of . . . the Boy Scouts." *Id.* § 23:2-3 (a benefit granted only to BSA and "other similar public organizations").

Finally, BSA received a federal charter in 1916, one of few organizations to have such a distinction. JA 314-321. BSA also receives numerous benefits from the federal government, ranging from tax exemption, I.R.C. § 170(c); Internal Revenue Publication 78; *cf. Bob Jones Univ. v. United States*, 461 U.S. 574 (1983), to special services, access, and supplies.[14] It touts its government connection in its public presentation. JA 46-55; JA 66; JA 106.

BSA's size, symbiosis with government at all levels, and broad invitation to volunteer leaders and "all boys," JA 66-68, demonstrate that it is far less "private" than most associations that operate in this country.[15] In fact, BSA has

license plate programs that generate funds for BSA. *See, e.g.*, Fla. Stat. Ann. § 320.08058; Ind. Code Ann. § 9-18-37-5. The favorable treatment of BSA under state laws also includes advantages relating to state lands and public facilities. *See, e.g.*, Tex. Parks & Wild. Code Ann. § 62-082; Kan. Stat. Ann. § 19-2696.

[14] These include services, medical supplies, and equipment from the Secretary of Defense, Navy, Marines, and Coast Guard, 10 U.S.C. §§ 2544, 7541; 14 U.S.C. § 641; and assistance from the National Guard, including transportation and the use of facilities. 32 U.S.C. § 508. The Secretary of Agriculture may waive fees for the use of national forest land as BSA camps. 16 U.S.C. § 539f. The Secretary of Defense may cooperate with BSA to establish scouting facilities and services for military personnel overseas, by which the Scouts may receive free transportation, office space, warehousing, utilities, and means of communication, as well as reimbursement for the pay of BSA personnel performing these services overseas. 10 U.S.C. § 2606.

[15] *Cf. Marsh v. Alabama*, 326 U.S. 501, 506 (1946) ("The more an owner, for his own advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statu-

gloried in its government imprimatur, which furthers that broad invitation. At the same time, BSA's very operations, structure, and public presentation implicate government in its membership practices. To the extent that "[a]n organization cannot speak except through its agents," Pet.'s Br. at 19, BSA has elected to speak to young people and the public through public entities and employees. Thus, gay youth may learn from their local police and fire departments, or in their classrooms, that while BSA has a "[p]ersonal invitation to every boy in school to join scouting," *supra* at 2, their identity as gay means that they are blackballed. The injury of discrimination is compounded when inflicted by an organization so intensely associated with the government, and government's interests in preventing such an injury are heightened.

II. THE FREEDOM OF EXPRESSIVE ASSOCIATION DOES NOT PREVENT NEW JERSEY FROM APPLYING ITS ANTI-DISCRIMINATION LAW TO BSA'S EXCLUSION OF YOUTH AND ADULTS KNOWN TO BE GAY

This Court has time and again rejected efforts by would-be discriminators to claim a First Amendment freedom to disassociate as a defense against civil rights laws targeting discriminatory conduct. Where the law at issue regulates a large membership organization's ability to exclude human beings based on their personal characteristics or identity, rather than its ability to express its ideas, this Court has

tory and constitutional rights of those who use it."). Among "private" organizations, BSA may well be the one that has most "clothed [itself] with a public interest justifying some public regulation," especially neutral regulation against discriminatory practices. *Chas. Wolff Packing Co. v. Court of Indus. Relations*, 262 U.S. 522, 536 (1923) (government has a special interest in regulating organizations with "a peculiarly close relation between the public and those engaged in it[, raising] implications of an affirmative obligation on their part to be reasonable in dealing with the public").

upheld the states' power to act. *See Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987); *New York State Club Ass'n v. City of New York*, 487 U.S. 1 (1988). This case involves identity-based discrimination, not any policy about or examination of views, as memorialized by both BSA's own internal documents and those sent to Dale. *See supra* note 5.

In the *Roberts* trilogy, the Court developed the analytic approach that should govern here. To test BSA's assertion of a First Amendment defense, the Court should ask (1) whether ending the policy of excluding all youth and adults known to be gay will affect in any significant way the members' ability to carry out their expressive purposes, and (2) if so, whether New Jersey's interest in the LAD outweighs any such burden.[16]

The lack of any significant burden on BSA's First Amendment interests is apparent from two distinct perspectives. First, the "views that brought [BSA's] members together," *Roberts*, 468 U.S. at 623, are not about homosexuality or sexual orientation. A reviewing court appropriately examines what message the members of an association collectively seek to express, much as courts examine the existence of religious beliefs and whether they are sincerely held—not

[16] Because the LAD is a neutral law of general applicability that regulates conduct, not expression, it could also be argued that those characteristics suffice to protect First Amendment interests and that the Boy Scouts' specific claim of expressive burden need not even be weighed under the *Roberts* trilogy approach. *See, e.g., Cohen v. Cowles Media Co.*, 501 U.S. 663, 670-72 (1991) (burden on press is "incidental, and constitutionally insignificant, consequence" of generally applicable law prohibiting bad practices); *Arcara v. Cloud Books*, 478 U.S. 697 (1986) (even where remedy to law's prohibition on non-expressive conduct may burden expression, no First Amendment analysis required); *see also Barnes v. Glen Theatre, Inc.* 501 U.S. 560, 572 (1991) (Scalia, J., concurring) ("as a general law regulating conduct and not specifically directed at expression, it is not subject to First Amendment scrutiny at all").

to decide the correctness of views or impose a philosophy on the group, but to verify the nature of the group's own expression. That limited inquiry here reveals that the expressive purposes of BSA's membership are not related in any way to homosexuality, and thus that ending discrimination on the basis of sexual orientation will have no impact on First Amendment interests.

Second, even if the nature of Scouting's programs and claimed expressive purposes are assumed to be exactly as set forth in BSA's brief, BSA has failed to show that abolishing its exclusion of gay members will cause any significant injury to those programs and purposes. While the upper echelons of the organization may interpret the BSA moral code to condemn homosexuality—and many adult members may share that view—BSA concededly does not at any point (1) express any anti-gay view to Scouting youth, or (2) require or instruct Scoutmasters to convey such a view in the recreational and educational programs that are the group's *raison d'etre*. Dale or another openly gay Scoutmaster can fully teach the positive message of family values and sexual responsibility that BSA emphasizes in its brief, just as closeted gay Scoutmasters, or non-gay Scoutmasters who happen to dissent from BSA's proffered interpretation of its moral code, now do.

Moreover, New Jersey's interests in enforcing its public accommodations law to end discrimination by a large civic organization that has woven its way into the fabric of American life and teamed up with government entities to sponsor its programs are compelling. Any small burden on First Amendment interests that might be found here is outweighed by the countervailing government interests in keeping the important opportunities Scouting provides free from sexual orientation-based discrimination.

A. The Court Should Decide This Case By Examining Whether Ending BSA's Exclusionary Policy Will Significantly Burden Its Members' Ability To Carry Out Their Expressive Purposes, And If So, Whether The State's Interests Outweigh Any Such Burden

1. Past Expressive Association Decisions Establish Sound First Amendment Standards That Should Govern Here

Though labor unions, schools, partnerships, membership organizations, and other entities have over the years attempted to assert a "right to discriminate" as a component of freedom of association, this Court has never accorded affirmative constitutional protection to the bare practice of group-based exclusion.[17] Nor has the Court recognized "a generalized right of 'social association'" or disassociation under the Constitution. *Dallas v. Stanglin*, 490 U.S. 19, 25 (1989). Rather, freedom of expressive association is an implicit, "instrumental" right, necessary for full enjoyment of the explicit First Amendment freedoms but also limited by their scope: "a right to associate *for the purpose of* engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion." *Roberts*, 468 U.S. at 618 (emphasis added); *see also New York State Club Ass'n*, 487 U.S. at 13.

Thus, the Court's touchstone in assessing whether a litigant presents a cognizable expressive association claim is a

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[17] *See, e.g., Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 93-94 (1945) (rejecting a "right of selection to membership" based on race); *Runyon v. McCrary*, 427 U.S. 160, 176 (1976) (" 'the Constitution . . . places no value on discrimination' ") (*quoting Norwood v. Harrison*, 413 U.S. 455, 469 (1973)); *Hishon*, 467 U.S. at 78 ("there is no constitutional right . . . to discriminate"); *Roberts*, 468 U.S. at 628 ("invidious discrimination in the distribution of publicly available goods, services, and other advantages [is] entitled to no constitutional protection").

showing of some significant burden on the litigant's ability to pursue its speech or other constitutionally protected group activities. In rejecting Rotary International's asserted expressive association defense to application of California's anti-discrimination statute, for example, the Court emphasized that "the evidence fails to demonstrate that admitting women to Rotary Clubs will affect in any significant way the existing members' ability to carry out their various [First Amendment] purposes." *Rotary*, 481 U.S. at 548.[18]

Moreover, even if a cognizable burden exists, the state's interests may still outweigh those of the litigant. As *Roberts* recognized, "the nature and degree of constitutional protection afforded freedom of association may vary depending on the extent to which . . . the constitutionally protected liberty is at stake in a given case." *Roberts*, 468 U.S. at 618; *see also Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) ("When deciding whether a state election law violates First and Fourteenth Amendment associational rights, we weigh the 'character and magnitude' of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary."). The Court rejected the Jaycees' expressive association defense by concluding, "even if enforcement of the Act causes some incidental abridgment of . . . protected speech, that effect is no greater than is necessary to accomplish the State's legitimate purposes." *Roberts*, 468 U.S. at 628. Thus, a balancing of the competing interests must take

[18] *See also Rotary*, 481 U.S. at 548 ("the Unruh Act does not require the clubs to abandon or alter" any of their "activities that are protected by the First Amendment"); *New York State Club Ass'n*, 487 U.S. at 13 ("Local Law 63 does not affect 'in any significant way' the ability of individuals to form associations that will advocate public or private viewpoints."); *Runyon*, 427 U.S. at 176 ("there is no showing that discontinuance of [the] discriminatory admission practices would inhibit in any way the teaching in these schools of any ideas or dogma").

place, and a compelling state interest can justify even "severe burdens" on the freedom of expressive association. *Timmons*, 520 U.S. at 358.

Whether the challenged state action regulates an organization's criteria for choosing members as well as "leaders" (as in this case and the *Roberts* trilogy), or only the selection of leaders or "standard bearers" (as in eligibility requirements for office that limit political parties' potential candidates), does not change the expressive association analysis. A group asserting that right must, in all cases, first show that the challenged state law significantly hampers its ability to pursue its constitutionally protected expressive goals. *See, e.g., Timmons*, 520 U.S. at 357-64; *Eu v. San Francisco County Democratic Ctr. Comm'n.*, 489 U.S. 214, 222-25, 229-31 (1989). If an actual burden is proven, then it is weighed against the government interests being served. *See, e.g., Timmons*, 520 U.S. at 363-70; *Eu*, 489 U.S. at 225-29, 231-33.

Yet BSA urges this Court to grant all "private, non-commercial, expressive associations" the *"unqualified* right to select their own leadership," Pet.'s Br. at 34 (emphasis added), even as it defines "leaders" fuzzily as at least all of the million-plus adult members of BSA (or, since "leadership" is a term with many meanings used throughout Scouting, many youth members as well).[19] This absolutist position would exclude the government from its well-established and necessary role in regulating political parties and primaries. It would severely undercut government efforts to end discrimination in civic life by excluding many of the advantages and privileges of membership (including powerful and important roles within an association that is a public accom-

[19] BSA mounts its defense in this Court with near constant emphasis on "leadership," as if it were prepared to renounce its current blanket membership policy and concede that at least some of its discrimination against gay youth who are or apply to be members is untenable.

modation) from the reach of civil rights laws. BSA's unqualified approach unmoors the right of expressive association from its proper focus on whether First Amendment activity, not simply a decision within or action by a group, is at stake, and on whether any burden on that activity is outweighed by government concerns.

This untethered approach finds no support in precedent or the Constitution. Indeed, the sole expressive association decision that BSA's proposal references, *Eu*, closely examined the First Amendment interests at stake in that particular case, and tested the weight of the government's asserted justifications. Ruling in favor of the political parties, the Court nevertheless noted that government intervention in other cases may be "necessary to prevent the derogation of the civil rights of party adherents." *Eu*, 489 U.S. at 232.[20] Expressive associations have no unqualified right to select their leaders in defiance of civil rights prohibitions (least of all under a policy that discriminates against members, too).

[20] Similarly, none of the Title VII cases BSA cites, Pet.'s Br. at 9, carve out a categorical exception for charitable organizations' leadership decisions. All of those cases were decided under the same statutory standards and proof requirements that apply to any Title VII case. The same should be true for BSA's expressive association claim here—it cannot be absolute. *Maguire v. Marquette Univ.*, 814 F.2d 1213, 1218 (7th Cir. 1987), held that the plaintiff had failed to show that her sex was a "motivating or substantial factor" in her being rejected for employment. In *Boyd v. Harding Academy of Memphis, Inc.*, 88 F.3d 410 (6th Cir. 1996), *Chambers v. Omaha Girls Club, Inc.*, 834 F.2d 697 (8th Cir. 1987), and *Harvey v. YWCA*, 533 F. Supp. 949 (W.D.N.C. 1982), the courts found that the employers had proven a legitimate, non-discriminatory reason or a bona fide occupational qualification to justify their actions. And in *Little v. Wuerl*, 929 F.2d 944, 951 (3d Cir. 1991), and *Gosche v. Calvert High School*, 997 F. Supp. 867, 871 (N.D. Ohio 1998), the courts found that the defendants fit within Title VII's statutory provision that allows religious institutions to limit employment to those with the same religious beliefs. (Under that provision, however, religious institutions must still refrain from other forms of prohibited identity-based discrimination, such as sex-based decisions).

To create such a right today would handcuff government, and defer absolutely to private choice, in myriad ways destructive to the traditional Constitutional balance.[21]

2. This Case Does Not Present The Kind Of "Peculiar" Application Of A Public Accommodations Law To Speech Itself That Took *Hurley* Out Of Expressive Association Jurisprudence

This case fits squarely in the line of the *Roberts* trilogy. Because it cannot prevail under that expressive association framework, as shown below, BSA heavily relies on one case, *Hurley*, to try to evade the LAD and this Court's expressive association precedents. However, in contrast to this case, *Hurley's* unique facts made it apparent that Massachusetts' "peculiar" application of its public accommodations law directly interfered with the parade sponsors' freedom of *speech*. *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 572-74, 578 (1995). Thus, the Court had no need to conduct the normal threshold inquiry it must undertake in expressive association cases to determine whether expressive purposes are burdened enough even to implicate the First Amendment. The facts of this

[21] The "ministerial exception" that allows churches and synagogues complete discretion in choosing their ministers and rabbis is based on unique concerns about government involvement in *religious* affairs and on the dual commands of the Free Exercise and Establishment Clauses. *See Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708-09 (1976); *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299, 1304 (11th Cir. 2000); *Combs v. Central Texas Annual Conference of the United Methodist Church*, 173 F.3d 343, 351 (5th Cir. 1999). Moreover, that exception has never been "explained as arising from freedom of expressive association," Pet.'s Br. at 32 n.8, but has always been rooted directly in the Religion Clauses. The exception survives *Employment Division Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). *See Gellington*, 203 F.3d at 1303; *Combs*, 173 F.3d at 349-50; *Equal Employment Opportunity Comm'n v. Catholic Univ. of Am.*, 83 F.3d 455, 461-63 (D.C. Cir. 1996).

case—where BSA seeks to exclude openly gay members, as such, and where a member invokes the public accommodations law simply to maintain his membership and pursue BSA's expressive goals (not to inject his own, separate views into the work of the organization)—do not support BSA's attempt to make *Hurley* override the *Runyon-Roberts* line of cases. *See infra* Point III.

B. Scouting's Members Are Not Brought Together By Any View Or Expressive Purpose That Implicates Sexual Orientation

As the *Roberts* trilogy establishes, an entity invoking an expressive association defense must—as a threshold matter—show "that it is organized for specific expressive purposes and that it will not be able to advocate its desired viewpoints nearly as effectively if it cannot confine its membership to those who share the same sex, for example," or some other personal characteristic covered by the antidiscrimination law. *New York State Club Ass'n*, 487 U.S. at 13; *see also id.* at 19 (O'Connor, J., concurring).

BSA italicizes its opposition to the idea that courts have a role in examining the nature of an organization's "moral message," Pet.'s Br. at 25-26, but the alternative is that any organization could claim a discriminatory expressive purpose without any factual basis and use that manufactured purpose to evade the civil rights laws. A discriminator's claimed message must at least be examined for its foundation in the organization's prior activities and speech. In fact, courts often are charged with piercing the pretextual claims put forth by those who seek to discriminate or who otherwise seek a freedom from neutral laws of general applicability. *See, e.g., United States v. Seeger*, 380 U.S. 163, 185 (1965) ("[W]hile the 'truth of a belief is not open to question,' there remains the significant question whether it is 'truly held.' This is the threshold question of sincerity which must be resolved in every case.") (citation omitted); *Philbrook v.*

Ansonia Bd. of Educ., 757 F.2d 476, 481 (2d Cir. 1985) ("it is entirely appropriate, indeed necessary, for a court to engage in analysis of the sincerity—as opposed, of course, to the verity—of someone's religious beliefs in both the free exercise context . . . and the Title VII context"), *aff'd*, 479 U.S. 60 (1986).

Because it is the *members'* First Amendment right to pursue the expressive purposes for which they associate that may be at stake, courts appropriately examine what the members formally declare, what they have seen or shared by way of organizational literature or communication, what they have not seen or shared, what they are charged with saying or doing either internally or externally, whom they associate with and how, and any other evidence relevant to the organization's true expressive goals. On these indicia, even with a deferential examination, it is clear that BSA's claim to have some expressive purpose that concerns homosexuality is a false premise for its purported expressive association defense. BSA members and sponsors in reality do not come together for any shared expression—any "specific expressive purposes" or actual "views that the club's members wish to promote," *New York State Club Ass'n*, 487 U.S. at 13—that relate to sexual orientation. That reality is what the New Jersey Supreme Court found, not "*impose[d]*," Pet.'s Br. at 25, and this Court should do the same.

1. No Message About Gay People Or Their Incompatibility With The BSA "Moral Code" Exists In Any BSA Communications To Adult Or Youth Members

BSA publishes a plethora of recruiting and informational materials, yet is unable to produce even a single document disseminated or generally made available to members or prospective members containing the "moral code" interpretation that it now argues as the basis of its gay exclusion. The Scout Oath, Law, Motto, and Slogan do not mention gay

people, homosexuality, or sexuality at all. JA 187-89. Nowhere in the Scout Handbook's extensive explanations of Scouting principles is there reference to people as gay or non-gay, or to the alleged moral superiority or inferiority of anyone based on sexual orientation. R.399-752. When asked under oath: "Is it an explicit aim of the Boy Scouts to discourage homosexuality?," both BSA and Monmouth Council replied: "No." JA 697; R.4405. There is no evidence that members or leaders are in any way instructed on the morality of heterosexuality or homosexuality, JA 694; JA 696-97; JA 753-54; JA 757-58, or that "sex is . . . part of the Scouting curriculum." JA 668; *see also* JA 655; JA 673.[22]

BSA has centered its defense on the claim that condemnation of gay people or homosexuality should be *inferred* from the requirements that Scouts be "clean" and "morally straight." But these terms are not defined anywhere in Scouting materials, in appeals or instructions to members, or in BSA's activities, in any way connected to sexuality. 55a. If a member or Scout leader wished to express to the public or other Scouts the meaning of "morally straight," and looked to the organization for guidance, he would see that "morally straight" is defined in the Scout Handbook as follows:

> To be a person of strong character, guide your life with honesty, purity, and justice. Respect and defend the rights of all people. Your relationships with others should be honest and open. Be clean in your speech and actions, and faithful in your religious beliefs. The values that you follow as a Scout will help you to become virtuous and self-reliant.

[22] BSA strives to explain away this remarkable total public and membership-wide silence on something so supposedly central as to require group-based exclusion, arguing that its Oath and Law "are a list of 'do's' rather than 'don'ts'." Pet.'s Br. 3. However, BSA materials do discuss aspects of life that BSA views as negative. *See, e.g.*, R.1473 (BSA President attacks "the five 'unacceptables' in society . . . child abuse, drug addiction, hunger, youth unemployment, and illiteracy").

JA 218. He would see nothing in the Handbook, or anywhere in Scouting materials or on its website, that communicates anything about gayness or homosexuality.[23]

It truly matters that nowhere in its program, applications, instructions, or activities has BSA ever communicated to members, sponsors, government, or donors that it interprets its Oath and Law as having a gay-incompatible meaning, because it allows BSA to have it both ways in a manner that the LAD does not permit and the First Amendment does not require.[24] There is a difference between a "policy" or practice stealthily implemented by officers, and the actual purposes that bring the members together. "Truth in advertising" is a fair minimal requirement for an organization seeking to trump a civil rights statute in the name of expression. At least so long as the members do not come together for any "specific expressive purposes" regarding gay people,

[23] The fact that certain or even large segments of society disfavor homosexuality does not evidence any expressive purpose on the members' part any more than past or present racism in society would support an analogous conclusion about the members' moral assumptions regarding racial minorities. *Cf.* Pet.'s Br. at 5. Numerous long-time participants in Scouting, including James Dale's father, JA 146-47; a Roman Catholic bishop, JA 571; and a Scouting National Explorer President, JA 688-90, have sworn that such an anti-gay view was never part of BSA, or anything they were required to believe, implement, or teach.

[24] If members one day read in the newspaper that BSA officials have excluded African-Americans, they would not necessarily think that remaining involved in the organization and its activities meant that *they* were embracing or expressing the "view" that African-Americans were not "morally straight" or "clean," or that race discrimination is really one of their organization's "expressive purposes." Knowing that theirs is the Boy Scouts *of America* (government participation and all), some might protest, while most would likely continue in pursuit of the true activities and purposes, ascribing the action to wrong-headed leaders, not to the organization. They would expect the courts to reject any specious assertion of "their" First Amendment rights to defend an expressive purpose that they never heard of, were never told to communicate, and had no need to protect.

BSA's identity-based exclusion is indefensible. *New York State Club Ass'n*, 487 U.S. at 13.

2. The Pluralism And Diversity Of Views That Characterize Scouting Refute BSA's Claim That Condemnation Of Homosexuality Constitutes An Expressive Goal

In part because Scouting "is identified with no particular faith, encourages no particular affiliation, nor assumes functions of religious bodies," R.880, its members do not all have the same concept of morality or the term "morally straight," or the same views on gay people or "homosexual conduct." *See, e.g.*, JA 153; JA 656; JA 663; JA 670-71. This is no mere "internal disagreement," Pet.'s Br. at 27, but rather reflects the organization's commitment to religious and philosophical pluralism in general,[25] and in particular a vast spectrum of views on sexuality as well as homosexuality that disproves any purported organizational perspective. The members of this association do not come together for any such shared message, or to express or inculcate something upon which they emphatically differ. *See supra* notes 6-7. Far from fulfilling these diverse members' expressive purpose in associating, the exclusionary policy directly contradicts the pluralism and "tolerance of all persons," Pet.'s Br. at 5, constantly presented to the public and the members as hallmarks of the organization and its expression.

Many within Scouting at every level have loudly voiced their condemnation of the exclusionary practice,[26] noting

[25] *See* R.2542-49. Scouting helps and urges youth to develop their own moral compass, reflecting the religious and political diversity of its membership, rather than one detailed, absolute philosophy. *See, e.g.*, JA 670 (*The Scoutmaster Handbook* emphasizes that: "Older Scouts may begin to develop a personal philosophy of life, reevaluating values and standards. . . . [They] combine advanced thinking ability with feelings, and are able to see good and bad as relative, not absolute.").

[26] *See generally* JA 146-47; JA 153-54; JA 597; JA 605-06; JA 609-10; JA 625-26; JA 626-29; JA 630; JA 635-37; JA 638-45;

their belief that sexual orientation discrimination is antithetical to the *true* tenets of Scouting, such as community service, honesty, inclusion, and respect for others. JA 154; JA 566; JA 571; JA 612-13; JA 625. Many in Scouting also believe that individuals are neither inherently moral or immoral because of their gay or non-gay status, or that discrimination itself is immoral and thus does not comport with the Scout Oath that Scouts keep themselves "morally straight." *See* JA 558; JA 565; JA 571; JA 575; JA 608-09; JA 626; JA 565; JA 663; JA 670; JA 689.

Indeed, perhaps the clearest indication that identity-based discrimination, rather than a burden on any actual Scouting message, is at issue here is that non-gay members are not expelled or even asked to refrain openly from sharing their views that the policy is wrong or that gay people are appropriate moral role models. By contrast, Dale was expelled not for expressing any particular view, but because outside of Scouting he revealed that he is gay.

C. Even Taking The Views And Programs Set Forth In Its Brief At Face Value, Reinstating Dale Would Have No Significant Effect On BSA's Ability To Carry Out Its Expressive Purposes

Even accepting, *arguendo*, the description of beliefs, "moral code," and educational programs in BSA's brief, ending status-based discrimination against gay members will not significantly affect the group's expressive goals.

JA 650-51; JA 651-53; JA 663-64; JA 687-89; R.1625-1905; R.3781; R.3805-06; R.3895; R.3958-59; R.4027-4328; R.4461-90; R.4478-85. *See also* Brief *Amici Curiae* of the Diocesan Council of the Episcopal Diocese of Newark, et al. in Opposition to the Petition for Writ of Certiorari.

1. BSA Has Not Charged Its Adult Members With Conveying Its Proffered View Against Homosexuality To Young People

While BSA officials may "believe that homosexual conduct is inconsistent with" the Scout Oath and Scout Law, Pet.'s Br. at 6, BSA fails to show that any adult member has ever conveyed or been instructed to convey that view to even a single young person. As its brief professes, "Boy Scouting does not have an 'anti-gay' policy, it has a morally straight policy." Pet.'s Br. at 6. BSA endeavors to teach "affirmative character traits," not a list of "don'ts." *Id.* at 3. Scouting materials touch on "sexual responsibility," "responsibility to women" and "to children," *id.* at 4-5; JA at 209-11, but "[o]fficial Scouting materials addressed to the boys do not refer to homosexuality or inveigh against homosexual conduct; rather, they teach family-oriented values and tolerance of all persons." Pet.'s Br. at 5. It follows that individual Scoutmasters' discussions with or responses to questions from youth would be of the same, affirmative quality. Certainly, a negative belief concededly left unexpressed in all of the voluminous written materials given to boys and leaders cannot be a critical component of the organization's effort to instill values.

Just as admitting women to the Jaycees did not impede that group's expressive efforts to "promot[e] the interests of young men," *Roberts*, 468 U.S. at 627, allowing openly gay members will not impede the Boy Scouts' teaching of "family values." Pet.'s Br. at 4. BSA can require that all Scoutmasters "disseminate its preferred views," *Roberts*, 468 U.S. at 627, and its "positive moral code for living." Pet.'s Br. at 3.[27]

[27] BSA falsely contends that "[t]o say that public accommodations laws apply to selection of Scoutmasters is to say that these positions must be open to all members of the general public." Pet.'s Br. at 43. But such laws require only that specified personal characteristics, such as sexual orientation, not be used in determining membership or other access. Entities like BSA remain free to use non-group-based criteria for participation, such as education or training requirements, or a commitment to teaching a prescribed curriculum.

Dale, like other openly gay youth and adults, can effectively do everything that BSA expects of its members. Dale can continue to teach the affirmative character traits central to Scouting, as well as the outdoor skills and more practical aspects of the program. His prior achievements within Scouting show his mastery of this material. Moreover, he can serve as a role model in the same way that other Scoutmasters do. Scoutmasters indeed lead by example, Pet.'s Br. at 3-4, during troop meetings, camping trips, community service projects, and discussions with Scouts, but *no* Scouting context calls upon them to "role model" sexuality, marriage, or intimate adult relationships. Thus, with BSA's acquiescence, Scoutmasters who are single, divorced, or gay and closeted all now serve and fulfill their leadership responsibilities, both through explanation and example. A Scoutmaster known to be gay can do the same, by teaching the organization's messages, and exhibiting the affirmative character traits that Scouting extols. as he undertakes all of his Scouting activities.

2. Dale's Identity Is Not A Message And Does Not Undermine Any Of BSA's Expressive Purposes

BSA expelled Dale not because of any particular view he articulated or believed, but because BSA officials discovered, from his disclosure unrelated to Scouting, that Dale is gay. JA 137-38. Even in the case of a nearly-lifelong, highly accomplished member, BSA officials summarily applied the anti-gay membership policy; in fact, they violated BSA's own procedures and declined to meet with the 20-year-old personally, stating that "no useful purpose would be served." JA 138; 13a. Nor does BSA get mileage from the fact that Dale himself disclosed his identity as a young gay man, because its discrimination targets "known," not merely "avowed," gay members. Cert. Pet. at 3. The

few internal BSA "position statements" reinforce that any youth or adult member known to be gay would be removed, regardless of how his sexual orientation came to be known, his individual views on any subject, or his performance within Scouting. JA 453-61.

Now, however, BSA tries to transform Dale's avowal of his sexual orientation into something more, and to insinuate that declaring oneself to be gay communicates more than one's sexual orientation. When a gay youth or adult says "I am gay" or provides that information to a newspaper reporter, he or she communicates only the fact about that one personal characteristic. Revealing one's gayness does not reveal a belief system, in contrast to revealing one's religion, atheism, political party, or membership in the Ku Klux Klan, *cf.* Pet.'s Br. at 28. The statement "I am gay"—like the statements, "I am Italian," "I am Latina," or "actually, I guess you can't tell, but my mother is African-American"—identifies a human being as a member of a group protected by the LAD. But beyond this mere identification, it does no more, and does not provide a basis for exclusion that is separate from the identity itself.[28] The law's protection against racial, ethnic, or sexual orientation discrimination does not end the moment a person reveals the

[28] Being gay cannot be used as a "shorthand measure" to disqualify an individual by imputing to him or her a "message." *New York State Club Ass'n*, 487 U.S. at 13. Learning someone is gay tells you nothing about his or her political party, religious beliefs, lifestyle, or moral code. *See People v. Garcia*, 92 Cal. Rptr. 2d 339, 344 (Ct. App. 4th Dist. 2000); *see also Elrod v. Burns*, 427 U.S. 347, 365 (1976) (cannot infer behavior or disposition to ill-willed conduct from membership in a political party). From the time of Lord Baden-Powell, gay people—including Dale as a schoolchild, as a teenager, as an Eagle Scout, and as an assistant Scoutmaster—have pledged the Scout Oath myriad times. They have transmitted the organization's messages to their fellow Scouts and the public for years. The Court should "decline to indulge" any contrary "overbroad assumptions," "stereotypical notions," or "sexual stereotyping" about openly gay people's ability to do so. *See Roberts*, 468 U.S. at 628.

information that might make her or him vulnerable to group-based prejudice.

Subsequent to his dismissal, Dale has voiced the opinion that BSA's conduct in excluding openly gay members is "bad and wrong." JA 513. This suit itself embodies that view, as would any suit challenging discrimination. Dale's perspective about the very exclusionary act that is at issue cannot provide a distinct reason—separate from his sexual orientation—for keeping Dale out, *cf.* Pet.'s Br. at 29, not least because if he proves unlawful discrimination and secures reinstatement there will be no ongoing dispute about that between the parties.

Moreover, contrary to BSA's representations, Dale does not wish "to use the bully pulpit of the Scoutmaster's position to communicate" anything other than Scouting's own organizational message. *Cf.* Pet.'s Br. at 22. He is not asking for a "platform upon which to expound" his personal beliefs. *Id.* The comments BSA relies upon (all made subsequent to the expulsion) indicate no unwillingness to continue expressing "the Oath and Law['s] positive moral code for living," Pet.'s Br. at 3, but, rather, disagreement with identity-based exclusion. Dale has sued to return to an organization in which he invested and excelled for twelve years. Once the unlawful discrimination in membership policy has been ended and he is reinstated, Dale is prepared to be bound by the same directives and limitations placed on all Scoutmasters.[29]

[29] BSA calls Dale a "gay rights activist," Pet.'s Br. at i, but such labeling cannot rewrite the basis of his expulsion or other facts of this case. The facts show that Dale is committed to the Boy Scouts' expressive messages and will further those—not any personal political goals—as a Scoutmaster. As Dale testified at his deposition, "I don't think sexual orientation ha[s] anything to do with Scouting." JA 498. BSA policy forbid "involve[ment of] the Scouting movement in any question of a political character," but does not "limit the freedom of thought or action of any official or members as an individual." JA 407-08. Dale's non-Scouting activities, such as the Rutgers University Lesbian/Gay Alliance, can-

Although the discriminatory practice has never been directly communicated even to all the volunteer leaders who run Scouting's programs, BSA concededly permits them to oppose it, should they learn of it. It cannot be, as BSA argues, that it is essential for its members not to associate with Dale, but fine to associate with the many non-gay members and sponsors who oppose anti-gay discrimination or who do not use sexual orientation as shorthand to determine morality. *See supra* notes 6-7.

In sum, BSA does not have the views and expressive agenda it claims, and even if its claims were taken at face value, they would not support the contention that allowing openly gay members will significantly hinder the group's shared goals. Thus, BSA's expressive association claim should be rejected because First Amendment interests are not at stake.

D. New Jersey's Interests In Ending Discriminatory Conduct By Public Accommodations Are Compelling And Outweigh Any Alleged Burden On BSA's Right To Expressive Association

The LAD has not been applied here "for the purpose of hampering the organization's ability to express its views." *Roberts*, 468 U.S. at 624. Rather, the statute has been used to correct status-based exclusion based on sexual orientation. The LAD does not "target speech or discrimination on the basis of its content, the focal point of its prohibition being rather on the act of discriminating against individuals in the provision of publicly available goods, privileges, and services on the proscribed grounds." *Hurley*, 515 U.S. at 572; *see also Roberts*, 468 U.S. at 623.[30] Thus, BSA's assertion that New Jersey is pursuing the illegitimate goal of dictating a speaker's message must be rejected.

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not have significance as to him when such outside activities are permitted to others associated with Scouting.

Far from serving an illegitimate purpose, the LAD advances vital government interests that outweigh any incidental burden (were any to be found) on the expressive interests of the Scouts. This Court has repeatedly held that public accommodations laws like the LAD "plainly serve compelling state interests of the highest order." *Roberts*, 468 U.S. at 624; *Rotary*, 481 U.S. at 549. "[A]cts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent—wholly apart from the point of view such conduct may transmit." *Roberts*, 468 U.S. at 628. In *Romer v. Evans*, 517 U.S. 620 (1996), this Court recognized that lesbians and gay men share the need for such protection. *Id.* at 628-29 ("Amendment 2 bars homosexuals from securing protection against the injuries that these public accommodations laws address. That in itself is a severe consequence.").

In adding a prohibition of sexual orientation discrimination to the LAD, New Jersey sought to protect individuals, institutions, and the government itself from the "enormous" price of such discriminatory conduct. 61a; *see also* N.J. Stat. Ann. § 10:5-3 ("such discrimination threatens not only the

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[30] In *Wisconsin v. Mitchell*, 508 U.S. 476, 484-85 (1993), the Court unanimously reaffirmed that anti-discrimination laws like the LAD are content-neutral regulations of conduct, and held the same with respect to hate crime sentencing enhancements, reasoning:

> [M]otive plays the same role under the Wisconsin statute as it does under federal and state antidiscrimination laws, which we have previously upheld under constitutional challenge. *See Roberts v. United States Jaycees, supra*, 468 U.S., at 628; *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984); *Runyon v. McCrary*, 427 U.S. 160, 176 (1976). . . . In *Hishon*, we rejected the argument that Title VII infringed employer's First Amendment rights. And more recently, in *R.A.V. v. St. Paul*, 505 U.S., at 389-390, we cited Title VII (as well as 18 U.S.C. § 242 and 42 U.S.C. §§ 1981 and 1982) as an example of a permissible content-neutral regulation of conduct.

Id.

rights and proper privileges of the inhabitants of the State but menaces the institutions and foundation of a free democratic State"). As the New Jersey Supreme Court emphasized below, "It is unquestionably a compelling interest of this State to eliminate the destructive consequences of discrimination from our society." 62a; *see also Peper v. Princeton Univ. Bd. of Trustees*, 77 N.J. 55, 80 (1978) ("New Jersey has always been in the vanguard in the fight to eradicate the cancer of unlawful discrimination of all types from our society").

States' leeway to determine the "breadth of the" problem, 61a n.15, and to include all extant categories of discrimination in their compelling effort to forbid such harmful conduct, is well supported both by federalism and by past precedent. *Roberts*, 468 U.S. at 623-24 (upholding Minnesota's interests in eradicating sex discrimination in public accommodations, a goal that went beyond federal civil rights protections); *Romer*, 517 U.S. at 627-29; *Hurley*, 515 U.S. at 571-72.[31] In this case the state interests are especially compelling because allowing BSA to discriminate would, in effect, cause government to sponsor the very activity it seeks to prevent.

The LAD "protects the State's citizenry from a number of serious social and personal harms." *Roberts*, 468 U.S. at 625. Discrimination in public accommodations "deprives

[31] The concerns about protecting states against federal incursion cited in *Kimel v. Florida Board of Regents*, __ U.S. __, 120 S. Ct. 631 (2000) (limiting Congress's Fourteenth Amendment, Section 5 power vis-a-vis state sovereignty), cut in precisely the opposite direction when it comes to allowing states to pursue their compelling interests in proscribing discrimination. Nor does this case require a determination of what level of scrutiny sexual orientation discrimination triggers under the Fourteenth Amendment. This Court has never held that the states are confined in their anti-discrimination efforts to those classifications deemed suspect, or that one national limit must fit all. Respect for federalism counsels that this Court not constrict states' power so tightly. This Court should decline BSA's invitation to tie the states' hands.

persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life." *Id.* The "state interest in assuring equal access [is not] limited to the provision of purely tangible goods and services," *id.*, or even more narrowly, to the commercial context. *Cf.* Pet.'s Br. at 35. Access to community leadership opportunities and skills, for example, has been recognized as one of the vital aspects of truly equal access to public accommodations. *Roberts*, 468 U.S. at 626. BSA's insinuation that leadership positions are not of concern to the state flies in the face of these statutes' very purpose. The women who challenged the Jaycees' and the Rotary Club's discriminatory membership policies, for example, already had some access to those organizations; their suit sought fully equal access and the opportunity to rise through the ranks just as men could. *Roberts*, 468 U.S. at 613; *Rotary*, 481 U.S. at 541.

Most fundamentally, public accommodation statutes seek to remedy " 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.' " *Roberts*, 468 U.S. at 625 (quoting *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964)). When BSA expelled Dale because it found out he is gay, the stigmatizing sting of that exclusion was "surely felt as strongly" by him as by those who in the past have been kept out of other public accommodations. *See Roberts*, 468 U.S. at 625. BSA's decision deprived Dale of important opportunities to grow, network, and contribute, JA 652-53, and strengthened the "barriers to . . . social integration" that have historically disadvantaged gay people. *See Roberts*, 468 U.S. at 626. New Jersey advances a compelling goal when it acts to eliminate that second-class status based on sexual orientation.[32]

[32] While it is true that 20-year-olds like Dale do not "have to" remain active in Scouting, many of them, like Dale, want to because they believe in the program. Likewise, although boys do not "have to" join

Because of BSA's size, prominence, and public orientation—indeed, government's own involvement in the organization—New Jersey has an especially powerful interest in not having those who participate in Scouting exposed to discriminatory practices. *See supra* Point I. The entities BSA invokes to urge hands off by the government—Jewish dating services, Asian-American theater companies, Promise Keepers prayer groups, and Women Anglers clubs, Pet.'s Br. at 45, or for that matter, Croatian Cultural Societies, *id.* at 37—do not seek or involve the joint participation of, or multiple benefits from, the government. They do not recruit in the public schools, make annual reports to Congress, or hold themselves out as open to all. They lack BSA's massive size, and are far more truly private; it is unlikely they would even fit within the LAD's definition of covered "public accommodations." These differences highlight why New Jersey has a greater interest in applying its civil rights law to BSA. This Court should reject BSA's overheated claims that barring its identity-based exclusion of Dale will "crush social pluralism" and compel homogeneity, Pet.'s Br. at 46, much as the Court has rejected similar unfounded prophecies (some made by BSA's own amicus briefs) in the *Roberts* trilogy.

Scouting, being a Cub or Boy Scout looms large in the life of many kids; in some schools or communities it may be the most enriching, "coolest," or even only program offered. *See* JA 66. Being—or not being—a Boy Scout can matter a great deal, and the pressures on young people and the harm of exclusion are serious and real. *See Lee v. Weisman*, 505 U.S. 577, 593 (1992) ("Research in psychology supports the common assumption that adolescents are often susceptible to pressure from their peers towards conformity, and the influence is strongest in matters of social convention."). BSA's discriminatory practice denies gay youth the important socialization skills, chance to connect with peers and society through community service, and basic outlets for fun and support that Scouting's programs offer.

III. THIS CASE INVOLVES IDENTITY-BASED EXCLUSION, NOT COMPELLED SPEECH

In addition to its expressive association argument, BSA attempts to repackage its defense of its discriminatory practice as a speech argument, asserting that enforcement of the LAD would "violate the organization's right to control its own message." Pet.'s Br. at 19. But when the content- and viewpoint-neutral LAD, *see Hurley*, 515 U.S. at 572; *Roberts*, 468 U.S. at 623-24, mandates non-discrimination in BSA's membership decisions, it neither targets nor requires speech. Rather, the law requires that non-gay and gay members be treated alike, participating side by side as Scouts or Scoutmasters under the same organizational rules. This case is about discrimination against Dale because of his identity and the viewpoint-neutral enforcement of a public accommodations statute and should not be twisted into a speech case. A human being such as Dale is not speech, much less a particular viewpoint.

In its effort to transform expressive association issues into a speech defense, BSA merges the concepts of compelled speech and symbolic speech in an unprecedented way, arguing in essence that a gay youth or adult member's continued participation within Scouting is inferred symbolic speech that the law compels BSA to make or respond to. But that conception is far too elastic. It would allow any discriminator faced with liability under a civil rights statute prohibiting identity-based discrimination to raise a First Amendment defense merely by stating that the inclusion of a person in the entity's activities is a government-mandated "message" of equality or support (*e.g.*, "women's lib," "black pride," or "gay pride") that the entity does not wish to make.

A. The Facts Of This Case Are Many Steps Removed From The Forced Speech-Within-Speech Of *Hurley*

As this Court emphasized, *Hurley* arose in a factual context that made the First Amendment interest in speaker autonomy virtually insurmountable. The state was forcing the inclusion of quintessential speech ("the marching GLIB contingent" carrying its own banner) within a parade (the "sponsors' speech itself"). *Hurley*, 515 U.S. at 572-73.[33] Massachusetts was putting words in the parade organizers' mouths. By contrast, New Jersey is putting a person (not speech) back into a membership organization (an entity that engages in activities that include expression but that is not "speech itself," as a parade is). Those two distinctions doubly remove this case from the speech-within-speech context of *Hurley*. BSA ignores this Court's care in *Hurley* not to equate inclusion of a person with inclusion of a compelled message, *id.* at 572, and not to equate parades with more traditional public accommodations. *Id.* at 571-73.

In addition, because Dale seeks continued inclusion as a person and does not seek to express any views within Scouting other than the Scouts' own message, BSA must hypothesize the asserted interference with its speaker autonomy from a (1) *implicit* message (2) allegedly conveyed by gay members' mere *presence* and (3) *attributed* to the BSA. Pet.'s Br. at 24 ("the very service of an openly gay person"). Yet a membership organization like BSA is understood

[33] Massachusetts' apparent "object [was] simply to require speakers to modify the content of their expression to whatever extent beneficiaries of the law choose to alter it with messages of their own. But . . . this object is merely to allow exactly what the general rule of speaker's autonomy forbids." *Hurley*, 515 U.S. at 578. Here New Jersey attempts no such modification of expression. Moreover, as opposed to a longtime member contesting his expulsion, the excluded contingent in *Hurley* formed for the very purpose of entering the organizers' parade, and sought "admission. . . as its own parade unit carrying its own banner," *id.* at 572, in order to communicate its ideas within someone else's parade. *Id.* at 570, 574.

through its own speech and activities, which are left undisturbed here, not through the personal characteristics, inferred beliefs, or inferred political positions of its individual members; indeed, BSA policy acknowledges as much. *See, e.g.*, JA 407-08 (BSA rules stating that the organization's limits on its involvement in political questions shall "not limit the freedom of thought or action of any official or member as an individual"). By contrast, the Court found it "clear that *in the context of an expressive parade*, as with a protest march, the parade's overall message is distilled from the individual presentations along the way, and each unit's expression is perceived by spectators as part of the whole." *Hurley*, 515 U.S. at 577 (emphasis added).

Moreover, the alleged inherent message that Dale's presence is asserted to convey is much more "difficult to identify" than GLIB's articulated message in *Hurley*, 515 U.S. at 570, 574-75. In fact, unlike GLIB, Dale has no desire to include a new message in Scouting's teachings, carry his own expressive sign or banner along with him as he performs his Scouting duties, or use Scouting as a "bully pulpit" for some other cause than the Scouting activities in which he excelled all along. For these reasons as well, BSA's analogy to *Hurley* is attenuated, and must fail.

Hurley "[did] not address any dispute about the participation of openly gay, lesbian, or bisexual individuals in various units admitted to the parade." *Id.* at 572. In fact, openly gay marchers who conveyed the organizers' messages were allowed in the parade. *See Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston*, No. 94-749, 1995 WL 301703, at **13-14 (U.S. Apr. 25, 1995) (Oral Arg. Tr.) (openly gay city councilor marched in parade as did other gay, lesbian and bisexual people). No one contended that having openly gay people communicating the parade organizers' message would inherently alter that message, nor did the organizers seek to invoke the tautological defense of sexual orientation discrimination that BSA

mounts here. The exclusion upheld in *Hurley* targeted message, not marchers; not in *Hurley* or in any other case has wholesale exclusion based on identity in defiance of a civil rights law ever been approved by this Court.

B. The Inclusion Of Gay Members Does Not Give Rise To A "Forced Speech" Or "Symbolic Speech" Claim

BSA would define known or openly gay members' existence itself as inherent forced speech, but this Court has never before embraced such an equation. As in *Hurley*, this Court's compelled speech cases all involved actual speech—an unwanted message either communicated by, or reasonably attributable to, a private speaker.[34] This Court has never allowed a covered entity to defeat an anti-discrimination law by claiming that the excluded person's identity itself constitutes speech—either compelled, or compelling a response—nor should it. To do so would ignore the Court's careful First Amendment distinctions and open an escape hatch for discriminators in nearly every case.

Non-discrimination is not forced speech, nor is it symbolic speech in the way that concept has been used in the past. This Court's symbolic speech cases involve individuals who prove that their non-speech conduct nonetheless was "intend[ed] to convey" a message and that the "likelihood was great that the message would be understood by those who viewed" their conduct. *Texas v. Johnson*, 491 U.S. 397, 404, 438 (1989) (emphasis added). Here Dale's existence in the Boy Scouts is the only "conduct." Unlike Johnson (who burned a flag) or O'Brien (who burned a draft card), *United*

[34] *See West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (state may not force person to utter the pledge of allegiance); *Wooley v. Maynard*, 430 U.S. 705 (1977) (state may not force person to bear the state's message on a license plate); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) (state may not force newspaper to print item); *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*, 475 U.S. 1 (1986) (state may not force utility to insert consumer rights flyer in its envelope).

States v. O'Brien, 391 U.S. 367 (1968), Dale intends to convey no personal message as a member distinct from the Scouting message he conveyed throughout his years in the organization. BSA is asserting that Dale's mere existence in Scouting is a "message" that others would then infer comes from this vast, diverse civic organization as a whole. Neither past cases nor the facts here provide a foundation for such a forced-symbolic-inferred speech defense to civil rights laws.

New Jersey has not decreed that BSA must allow gay members to adorn themselves with gay rights symbols or carry gay rights banners. It has only ordered that gay kids and adults receive the privileges and advantages of Scouting, and be permitted to participate under the same rules as others, without exclusion based on sexual orientation. Even if people within or outside Scouting know that this or that one among the five-million-plus youth and adult members are gay, those members' existence among the many others sends no divergent message, is not understood to convey one, and requires (and precludes) no expression from BSA.

Because a gay person does not inherently convey any viewpoint, BSA repeatedly invokes the uniform and argues that the uniform transforms Dale into a BSA message about the morality of homosexuality. Wearing the uniform may signify a belief in and support for Scouting. But it does not, in reverse, convey Scouting's endorsement of all of the individual's personal characteristics, political positions, or moral beliefs. Thus, Scouting willingly allows heterosexuals who publicly state their position that homosexuality is moral, or that known gay people should not be excluded from the organization, to proudly wear their uniforms. The sight of any individual in the uniform does not readily translate into any discernible statements about morality. Dale in his uniform participates along with heterosexuals, closeted gay people, a racially, religiously and politically diverse membership, and government sponsors—all conveying pride in

Scouting while they differ on much else. The only plausible additional message might be one of inclusion, non-discrimination, or compliance with the law; there is no reasonably attributable endorsement of any particular group, individual behavior, or individual belief. Thus, allowing Dale, like all Scouting's other members, to wear his uniform does not compel any speech from BSA on homosexuality.

In uniform or not, moreover, BSA can hand Dale its chosen script of messages, just as it does for all adult members, and require him faithfully to convey it. BSA is baldly speculating when it worries that Dale will "interject[ ] his own opinion" in troop discussions (or file a "hostile environment" law suit because of BSA's internal, alleged views about homosexuality). Pet.'s Br. at 38. The present case remains about identity-based exclusion, not about any personal views interjected into Scouting or a views-based contortion of the LAD. Dale presents no greater risk of departing from Scouting's message than any other Scoutmaster, including the (non-gay) opponents of the challenged membership policy who remain valued leaders in the organization. As discussed above, Dale can and will teach effectively through role modeling as well as exhortation, because no Scout leader is expected to "role model" adult sexuality or intimate relationships. Scoutmasters serve as role models for the positive character traits and practical skills that can be conveyed through Scouting's outdoor activities, community service, and educational programs. These do not include lessons or activities related to sexual orientation.

The only "genie" that is out of the bottle, *cf.* Pet.'s Br. at 29, is the fact that Dale is gay. Dale's personal pride in his whole self, including his sexual orientation, stated as a matter of individual feeling outside Scouting, is not attributable to the organization. Nor is Dale seeking to trumpet that feeling or inject a "gay pride message" within his Scoutmaster responsibilities; he asks for reinstatement of his member-

ship, not to add any extraneous opinions to the Scouting approach. Likewise, much as BSA tries to distort Dale's statement about his own search for gay role models at Rutgers into some personal speech or lesson he may try to bring into his Scouting activities, there is absolutely no record evidence to support that notion. As Dale has made clear, he wants to continue to serve in the BSA to provide young people with a *Scouting* role model, which is "not about sexuality." JA 549.

C. Even Were There Some Cognizable Infringement On Speech, Application Of The LAD Easily Satisfies The *O'Brien* Standard

For state regulations that are not directed at speech, but that nonetheless place a limit on constitutionally protected expressive conduct, *O'Brien, supra*, sets the governing First Amendment standard. Of course, before *O'Brien* can be invoked, sufficient speech interests must be at stake in the case, *see Texas v. Johnson*, 491 U.S. at 403, a threshold not met here. *See supra* note 16. If the LAD were to be tested against the standard for incidental infringements on expression, however, it would easily pass *O'Brien's* four-part test:

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

391 U.S. at 377.

Public accommodations statutes "are well within the State's usual power to enact[.]" *Hurley*, 515 U.S. at 572. As shown above, the LAD serves compelling, not merely important, state interests. *See supra* at 34-38. This govern-

ment effort to end discrimination in the goods, privileges and advantages of public accommodations "does not aim at the suppression of speech." *Roberts*, 468 U.S. at 623; *see also supra* at 34-35. Moreover, its provisions sweep no greater than necessary to further the goal of ending discriminatory conduct by entities that open their doors to the public. *See supra* at 36-38 (discussing the vital government interests in including groups like BSA within the law and in covering leadership as well as lesser opportunities); *see also Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 299 (1984) (*O'Brien* standard largely defers to government judgments about "how much protection" of its interests is necessary and "how an acceptable level" of its goal is to be attained).

IV. THE FREEDOM OF INTIMATE ASSOCIATION DOES NOT SHIELD AN ORGANIZATION LIKE BSA

The freedom of intimate association shelters highly personal relationships of mutual self-definition, exemplified by those "that attend the creation and sustenance of a family.[35] *Roberts*, 468 U.S. at 619. Unlike most relationships, intimate associations "involve the deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life." *Id.* at 619-20. They exhibit "such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from

[35] Although intimate associational rights are not limited to family relationships, courts have refused to find the right to intimate association implicated in many contexts. *See, e.g., Wallace v. Texas Technical Univ.*, 80 F.3d 1042, 1051 (5th Cir. 1996) (coach-student relationship); *Salvation Army v. Department of Community Affairs*, 919 F.2d 183, 197 (3d Cir. 1990) (religious adult home); *Watson v. Fraternal Order of Eagles*, 915 F.2d 235, 243 (6th. Cir. 1990) (fraternal lodge); *Rode v. Dellaciprate*, 845 F.2d 1195, 1204 (3d Cir. 1988) ("good friends").

others in critical aspects of the relationship." *Id.; see also Rotary*, 481 U.S. at 545-46. Like Rotary Clubs, whose entitlement to constitutional protection BSA told this Court in 1986 was "similar[ ]" to its own, BSA lacks the characteristics of a protected intimate association. *See* Brief *Amicus Curiae* of the Boy Scouts of America in Support of Appellants Rotary International, *et al.* (Dec. 18, 1986), at 9.

BSA is vast and exceptionally unselective. Its "national objective, as well as for regions, areas, councils, and districts, is to see that *all eligible youth* have the opportunity to affiliate with the BSA." JA 64 (emphasis added).[36] BSA's goal of an all-inclusive "representative membership" applies from top to bottom. *See* JA 67 ("[W]e have made a commitment that our membership shall be representative of all the population in every community, district and council.") (emphasis added); *see also* R.1033.

Despite this consistent theme, BSA now attempts an intimate association argument on behalf of its local troops. But even the smallest BSA group is tellingly nonselective in accepting both youth and adult applications. *See, e.g.*, JA 751 (testimony of James Kay that he recalled no rejection of any application). Except for the minimal membership criteria, which are decided at the national level, JA 457-56, troops open their doors to all. The Scoutmasters and Scouts exercise no personal selectivity in choosing their associates,

[36] BSA troops are indeed far less selective than Rotary Clubs. Local Rotary Clubs are "not open to the general public," *Rotary*, 481 U.S. at 547, and membership is limited, under the Rotary "classification system," to persons in a "leadership capacity in his business or profession." *Id.* at 540. Despite such restrictions the Court found Rotary Clubs to be too unselective and inclusive to qualify as intimate associations. *See id.* at 546-47. Furthermore, Rotary Clubs, like BSA troops, carry on many of their activities "in the presence of strangers," *id.* at 547, are approximately the same size as many BSA troops, *see id.* at 546 (noting that the range of sizes of local Rotary Clubs begins at "fewer than 20"), and have similar goals—"humanitarian service, high ethical standards, good will, and peace"—to those of the BSA. *Id.* at 548.

the kind of selectivity that is necessary for a protected intimate association. Their selection preferences and the individual attachments of any troop are irrelevant to BSA's structure. JA 32; JA 701. Indeed, there is absolutely no evidence that any of Dale's fellow troop members (or their parents) wished his expulsion.

In any case, BSA activities and association cannot be confined to the individual troop. Dale took part in leadership programs, JA 117, jamborees and scout camp, JA 120, a national jamboree, JA 125, scout shows, a Klondike Derby, newspaper drives, and council-wide fundraisers, JA 480, all outside the confines of his troop. *See* JA 109; JA 126; R.693; R.880. Many of these events are also open to the public and are promoted by BSA allowing "community residents [to] see Scouting in action." R.838. That certain BSA activities take place in smaller groupings does not erase the generally broader nature of the organization's activities and offerings, any more than members dining at "tables for two" would have exempted the clubs in *New York State Club Ass'n*.

Beyond these characteristics, BSA troops are also not the type of intimate associations that needs protection from "unjustified interference by the State," *Roberts*, 468 U.S. at 610, as many troops are indeed sponsored by and owned by the State and other public entities with whom BSA has associated itself. *See supra* at 1-2, 13-15. This chosen entwinement, along with BSA's vigorous self-promotion in the public realm, further dispels a need for a shield against the law based on a desire for intimacy, personal choice, and seclusion.

Nor is BSA's argument advanced by its attempt to squeeze into its purported First Amendment right of intimate association a defense based on "protection of the rights of parents to control the education and upbringing of their children." Pet's Br. at 42. As a factual matter, parents have

no more control over BSA policies than do their children. BSA has not shown that parents in general are ever consulted for their views, much less that those views affect BSA policy. *See* JA 693 (deposition of BSA officer Charles Ball, stating that neither he nor anyone in BSA overall has taken any steps to determine parents' views on the group-based exclusion). In fact, given BSA's silence on sexual orientation everywhere but in court, and its claimed indifference to closeted gay members and leaders, Pet.'s Br. at 6, parents cannot be presumed to be "select[ing a] 'wise friend"' on that basis. Pet.'s Br. at 43; *see* R.1962-73; R.1974-80 (affidavits of Scouting parents who were unaware of the anti-gay policy, and who do not support it).

As in *Runyon v. McCrary*, 427 U.S. 160, 177 (1976), this case does not involve parents' right to choose what institutions they entrust with their children. Parents can enroll their kids in any given troop, or not, as they please, but have no right to dictate the other members, leaders, or organizational policies. This Court should not accept BSA's sweeping and open-ended argument, which would turn any parent's "different ideas" into a weapon for discriminating third-parties such as day-care centers, schools, and the like.[37] Pet.'s Br. at 42.

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[37] This Court's precedents do not support BSA's novel claim. The LAD does not rob parents of any autonomy; it does not force a parent to subject their children to a certain curriculum, *Meyer v. Nebraska*, 262 U.S. 390 (1923), or to send their children anywhere they do not wish. *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Pierce v. Society of the Sisters*, 268 U.S. 510 (1925). Application of the LAD does not "affirmatively compel [parents], under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs." *Yoder*, 406 U.S. at 218. BSA's attempt to use the First Amendment as a sword to exclude boys and adults from its ranks (in the name of parents never consulted) is not akin to the Amish community's invocation of the First Amendment as a necessary shield to prevent the State from "gravely endanger[ing] if not destroy[ing] the free exercise of [their] religious beliefs" and their "way of life." *Id.* at 218-19.

Finally, this case does not involve "the subject matter which is taught" in such organizations. *See Runyon*, 427 U.S. at 177. It solely involves "the practice of excluding [certain groups] from such institutions," the very type of "[i]nvidious discrimination [that] has never been accorded affirmative constitutional protections." *Id.* at 176 (citation omitted). Neither intimate association nor BSA's proposed new right of "parental direction," Pet.'s Br. at 42, should be permitted to thwart the LAD here.

CONCLUSION

For the foregoing reasons, this Court should affirm the unanimous decision below, upholding application of New Jersey's LAD to BSA's anti-gay membership policy and directing James Dale's reinstatement.

Dated: March 29, 2000

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